STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2014
v DARNELL RUSH, Defendant-Appellant.	No. 312055 Wayne Circuit Court LC No. 12-000934-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DARIUS RUSH, Defendant-Appellant.	No. 316564 Wayne Circuit Court LC No. 12-001081-FC

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

In this consolidated appeal, defendants were tried together before separate juries. In Docket No. 312055, Darnell Rush appeals as of right his convictions for armed robbery, MCL 750.529; carjacking MCL 750.529a; first-degree home invasion, MCL 750.110a(2); conspiracy to commit first-degree home invasion, MCL 750.110a(2) and MCL 750.157a; and receiving and concealing stolen property less than $200, MCL 750.535(5). He was sentenced as a fourth habitual offender, MCL 769.12, to 30 to 60 years' imprisonment for the armed robbery and carjacking convictions, 99 months to 20 years' imprisonment for the conspiracy to commit home invasion conviction, and time served for the receiving and concealing stolen property conviction. These sentences were to run concurrently to one another and consecutive to defendant's 30 to 60 year sentence for the first-degree home invasion conviction.

In Docket No. 316564, Darius Rush appeals as of right his jury trial conviction for first-degree home invasion, conspiracy to commit first-degree home invasion, and receiving and concealing stolen property less than $200. He was sentenced as a third habitual offender, MCL

769.11, to 217 months to 40 years' imprisonment for the first-degree home invasion, and 87 to 40 years imprisonment for the conspiracy to commit home invasion conviction. The trial court ordered that the two sentences be served consecutively to one another. Defendant received time served for the receiving and concealing conviction.

In Docket No. 312055, we affirm Darnell's convictions and sentence. In Docket No. 316564, we affirm Darius's convictions, but vacate his sentence and remand for resentencing.

I. BASIC FACTS

Darnell is Darius's uncle. The various charges stem from a January 9, 2012, robbery that they committed with two other men, Desmond Robinson and Deandre Cannady. As part of a plea agreement, Cannady testified that the four men went to the 80-year-old victim's house in order to rob him. They approached the victim under the guise that they were interested in buying his car. Darnell pushed the victim into the house through the open doorway and held a small metal blade to the victim's neck while the other three men entered the victim's house and stole items from the victim's person and his house. In their respective statements to the police, both Darnell and Darius admitted to their involvement in the robbery. They were convicted and sentenced as outlined above and now appeal as of right.

II. DOCKET NO. 312055

A. DARNELL'S STATEMENT TO POLICE

Darnell argues that the trial court erred by denying his pretrial motion to suppress his statement to the police, claiming that his statement was involuntary. We disagree.

"A trial court's ruling on a motion to suppress evidence is reviewed for clear error, but its conclusions of law are reviewed de novo." *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008). "We will reverse a trial court's decision in this regard if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993).

"The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005), citing US Const, Am V; Const 1963, art 1, § 17. In *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court established "procedural safeguards . . . to secure the privilege against self-incrimination." Under *Miranda*, where a criminal defendant is subjected to a custodial interrogation, "[p]rior to any questioning, the [defendant] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney . . . ." *Miranda*, 384 US at 444. "Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *Tierney*, 266 Mich App at 707.

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience

> with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
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> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988) (internal citations omitted).]

At the *Walker*[1] hearing, Darnell testified that the police gave him a form advising him of his constitutional rights under *Miranda*,[2] which he read, understood and signed. However, according to Darnell, the waiver and subsequent statement were involuntary because the only reason he waived his rights and gave a statement was so that he could receive the medication that he needed. According to Darnell, he took prescription medication for depression and anxiety, but had not taken his daily medication at the time of his arrest and subsequent police interrogation. Darnell testified that he "pleaded" with the police to allow him to take his medication, but they refused his requests. Darnell testified that without his medication, he became "fidgety" and "antsy" and could not think clearly during the interrogation.

The interrogating officer testified at the *Walker* hearing that Darnell never requested medication or indicated that he took prescription medication. The officer testified that Darnell's behavior was normal and that he did not appear to be abnormally "fidgety" or "agitated." The officer further testified that Darnell was not promised anything in exchange for his cooperation, nor was he threatened in any way to compel cooperation.

The trial court admitted Darnell's written statement into evidence, along with his advice of rights form. Darnell's written statement indicated that on the morning of January 9, 2012, he, Darius, Robinson, and Cannady went to the victim's house. When the victim opened the front door, Darnell followed Robinson into the house. "I put a small piece of metal by the old man's neck and I told him I don't want to have to f*** you up just give these guys what they want." Darnell restrained the victim on the couch. Robinson took the victim's keys and wallet. They left the victim's house with his wallet, gold jewelry, and computer. Robinson drove Darnell and Darius from the scene and Cannady drove the victim's Impala from the scene. Thereafter, Darnell and Darius took the gold to the pawn shop.

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The trial court denied Darnell's motion, concluding that he voluntarily waived his *Miranda* rights and gave his statement to the police. In so finding, the trial court noted that Darnell's statement indicated that he was thinking clearly at the time of the statement: "The other thing that's very telling is that when you hear that statement . . . it's very concise. It doesn't ramble, and it doesn't show a person who was not thinking clearly at the time."

On the record before us, the trial court did not clearly err by finding that Darnell voluntarily, knowingly, and intelligently waived his *Miranda* rights. "The trial court is in the best position to assess the crucial issue of credibility." *People v Akins*, 259 Mich App 545, 566; 675 NW2d 863 (2003) (citation omitted).

B. SUFFICIENCY OF THE EVIDENCE

Darnell next argues that the prosecution failed to present sufficient evidence to support his first-degree home invasion conviction. We disagree.

"[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Moreover, "when reviewing claims of insufficient evidence, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict." *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

Darnell argues that the prosecution failed to present sufficient evidence of "breaking" because the evidence indicated that the front door was already open. However, "first-degree home invasion . . . can be committed in several different ways, each of which involves alternative elements necessary to complete the crime." *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010).

Element One: The defendant either:

1. breaks and enters a dwelling[ ] or

2. enters a dwelling without permission.

Element Two: The defendant either:

1. intends when entering to commit a felony, larceny, or assault in the dwelling or

2. at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault.

Element Three: While the defendant is entering, present in, or exiting the dwelling, either:

1. the defendant is armed with a dangerous weapon or

2. another person is lawfully present in the dwelling. [*Id*.]

Accordingly, contrary to Darnell's position, the prosecution was not required to prove that he "broke into" the victim's house. The victim did not give any of the men permission to enter his house, and the defense provided no evidence to the contrary. Thus, the prosecution presented sufficient evidence to support the first element of first-degree home invasion conviction. Because the first element is Darnell's only challenge to the conviction, there was sufficient evidence to convict Darnell of first-degree home invasion.

III. DOCKET NO. 316564

A. SENTENCING ISSUES

Darius argues that the trial court committed multiple sentencing errors that entitle him to relief.

1. HABITUAL OFFENDER STATUS

Darius first argues that the trial court erroneously sentenced him as an habitual offender, third offense, on the basis of sentences he received under the Holmes Youthful Trainee Act (HYTA) during the year preceding the instant offense. We agree.[3]

Darius pleaded guilty to two separate second-degree home invasions in 2011, stemming from offenses he committed on April 5, 2011 and April 8, 2011, respectively. He was sentenced to probation under HYTA for both offenses. The PSIR indicated that Darius was a third habitual offender on the basis of those two offenses and that probation violation warrants were active in both.

Because Darius was assigned the status of a youthful trainee under HYTA for both of his 2011 second-degree home invasion offenses, the trial court erred in considering him a third habitual offender when sentencing him for the instant convictions.

The HYTA, MCL 762.11 *et seq*., provides

> if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, *without entering a judgment of conviction* and with the consent of that individual, consider and

[3] At the sentencing hearing, Darius' counsel affirmatively stated that he had no additions or corrections to make to the presentence investigation report (PSIR), which classified Darius as a third habitual offender, and that he had "verified its factualness with" Darius. Although it may be argued that Darius waived the issue for appellate review, we note that sentencing errors are subject to more lenient waiver rules. See *People v Hershey*, 303 Mich App 330; ___ NW2d ___ (2013).

> assign that individual to the status of youthful trainee. [MCL 762.11(1) (emphasis added).]

The HYTA further provides

> An assignment of an individual to the status of youthful trainee as provided in this chapter *is not a conviction for a crime* and . . . the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee. [MCL 762.14(2) (emphasis added).]

"An assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee." *People v Dipiazza*, 286 Mich App 137, 141; 778 NW2d 264 (2009).[4] While probation violations had been issued, Darius's status had not yet been revoked. Therefore, the trial court plainly erred by sentencing Darius as an habitual offender.

"A defendant is entitled to be sentenced by a trial court on the basis of accurate information." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). The trial court relied on inaccurate information and sentenced Darius to terms of imprisonment that exceeded the sentencing guideline range for first-degree home invasion and violated the statutory maximum sentence for both first-degree home invasion and conspiracy to commit first-degree home invasion. Therefore, we vacate Darius's sentences and remand for resentencing.

2. CONSECUTIVE SENTENCING

Darius argues that the trial court abused its discretion by imposing consecutive sentences.

"In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute." *People v Ryan*, 295 Mich App 388, 401; 819 NW2d 55 (2012) (internal quotations omitted). "The purpose of consecutive-sentencing statutes is to deter persons from committing multiple crimes by removing the security of concurrent sentencing." *Id*. at 408. "The consecutive sentencing statutes should be construed liberally in order to achieve the deterrent effect intended by the Legislature." *People v Williams*, 294 Mich App 461, 474-475; 811 NW2d 88 (2011) (quotation omitted).

MCL 750.110a(8) provides that "[t]he court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." Darius concedes that the trial court was authorized to impose consecutive sentences, but argues that the trial court nevertheless abused its discretion in choosing to do so in this case. "[W]hen a trial court imposes

[4] This is distinguishable from MCL 777.50(4)(a)(*i*), which defines "conviction" for the purposes of scoring Prior Record Variables as including "[a]ssignment to youthful trainee status under [MCL 762.11 to MCL 762.15]."

consecutive sentences, the principle of proportionality requires that the sentences be separately evaluated by appellate courts." *People v Hill*, 221 Mich App 391, 397; 561 NW2d 862 (1997). Darius contends that because his conspiracy to commit first-degree home invasion "itself injected no additional trauma to the [victim] beyond that which he suffered due to being the victim of the actual" first-degree home invasion, the trial court abused its discretion by imposing consecutive sentences. Darius provides no authority supporting that a trial court abuses its discretion where it imposes consecutive sentences for an offense that does not inject "additional trauma" to the victim. In sentencing Darius, the trial court noted that Darius actively participated in the armed robbery of an elderly old man who was alone at the time of the robbery, and found that those circumstances warranted a significant sentence. Given that "consecutive sentencing statutes are to be construed liberally in order to achieve the deterrent effect intended by the Legislature," *Williams*, 294 Mich App at 474-475 (quotation omitted), Darius has not shown that the trial court erred by exercising its discretion to impose consecutive sentences in this case.

3. PROPORTIONALITY

Darius further argues that his sentences were disproportionate and, thus, constituted a cruel and unusual punishment. Darius's sentence fell within the statutory guideline minimum sentence range. "A sentence that falls within the appropriate sentencing guidelines range is presumptively proportionate." *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011). Moreover, a proportionate sentence is not a cruel or unusual punishment under the federal or state constitution. *People v Powell*, 278 Mich App 318, 323-324; 750 NW2d 607 (2008).

B. DARIUS'S STANDARD 4 BRIEF

Finally, Darius attempts to raise several issues, none of which are included in a statement of the questions presented and none of which are sufficiently supported by citation to the record or authority. These claims are deemed abandoned; thus, we need not consider them. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009); *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007).

In Docket No. 312055, we affirm Darnell's convictions and sentence. In Docket No. 316564, we affirm Darius's convictions, but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly